No. 11403

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM RAY OLSEN, claimant of One Article of device labeled in part "Spectro-Chrome."

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United State for the District of Oregon.

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CITATIONS

MISCELLANEOUS

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STATEMENT OF THE CASE

On June 14, 1945 there was shipped in interstate commerce from Newfield, N. J., to the home of the claimant, William R. Olsen, Portland, Oregon, a machine labelled "Spectro-Chrome", which was represented by the shipper to have certain curative benefits. It was received in Portland on or about June 25, 1945, by Olsen, who paid for the machine, and it was kept con-

tinuously in his home and was used exclusively by himself and his mother, to secure relief from their ailments. They were perfectly satisfied with the results attained therefrom.

More than a month later, to-wit: July 28, 1945, a deputy U. S. Marshal forcibly entered the private home of Olsen, and over his protests forcibly seized and removed this machine (Affidavit of Olsen—Tr. p. 27).

The U. S. Marshal, in forcibly entering this private home, had no warrant of arrest, had no search warrant, but purported to act under a warrant of seizure issued upon a libel of condemnation filed by the United States Attorney, acting upon instructions of the Federal Security Agency, and without any showing of probable cause, supported by oath or affirmation of personal knowledge.

It was stipulated, subject to the objection as to its competency and materiality, that the machine, when introduced into and while in interstate commerce, was accompanied by printed matter containing a number of misleading and false statements as to the cures that could be effected by this machine.

It was asserted by the claimant, without contradiction, that the machine when seized and taken from his home was not mislabeled or misbranded; that it had found permanent lodgment in his home; was intended for his personal use only, and was not intended for the purpose of resale or reshipment. (Affidavit of Olsen—Tr. p. 27) (Testimony of Olsen—Tr. p. 100-111).

Pending the trial of the cause, upon motion of the claimant to restore the machine to him, the court granted

the motion and the machine was returned.

Upon the trial on its merits, the court made findings of fact which included the following:

a. That the machine was not inherently dangerous.

b. That the claimant did not consent to the entry in his home for any purpose connected with the case.

c. That the machine was acquired for the sole and exclusive use of himself and members of his family, and that it was at all times kept in his home and possession for such purpose, with no intention at any time to transport, sell or use the machine for any commercial purpose.

d. That the claimant and his mother had been helped in the treatment of their bodily ailments.

Based upon these findings the court, in dismissing the libel held:

1. That the machine at the time of its seizure from the private home of the claimant had passed beyond interstate commerce channels; that it was exclusively within the home and possession of the claimant for his own use, with no intention of transporting or selling the same, and that therefore no interstate transportation was involved in the case.

2. That the claimant and members of his family were entitled to use the machine for treatment of their bodily ailments without interference by the Government or its agents.

The opinion of the trial court is set out on page 45 of the transcript of record, and is reported in *U. S. vs. One Article "Spectro-Chrome"*, 66 Fed. Sup. 754.

I.

Federal Regulation and Control of Contraband Articles Shipped in Interstate Commerce Ceases When the Articles Have Passed Beyond Interstate Commerce Channels and Are Exclusively Within the Possession of a Private Individual, and Are Kept for His Own Personal Use With No Intention of Transporting or Selling the Same.

The Government in this instance attempted to extend its power under the commerce clause of the Constitution by the seizure of an alleged article of contraband from the private home of an ultimate purchaser long *after* the interstate transportation had ended, and notwithstanding that at the time of the seizure the article itself was not misbranded, was not injurious per se, and was being kept and used by the purchaser and his family for their personal use, and with no intention of resale or retransportation.

It is impliedly conceded by the Government that prior to the enactment of the 1938 Food, Drug and Cosmetic Act, the 1906 Food and Drug Act did not authorize the seizure for condemnation of a contraband article from the private home of an ultimate purchaser or user thereof, but it is contended that the 1938 Act granted such power by the words of the Statute, that a misbranded article introduced in interstate commerce may be proceeded against "while in interstate commerce *or at any time thereafter.*" It is in the italicized words that the Government claims its authority to pursue the

offending article even in the privacy of a home, and even though it had long ceased to be a medium of interstate traffic or sale. Such a claim, aside from being legally unsound, ignores reality and would result in such defiance of Constitutional guarantees as to forbid judicial sanction. (*Federal Trade Commission vs. American Tobacco Co.,* 264 U.S. 298—32 A.L.R. 786).

Such a construction of the Act by the Government is clearly unwarranted when the Act is read in its entirety, and when considered in the light of the constitutional limitations on Congress in its regulation of interstate commerce.

In construing a statute, it is fundamental that the whole Act must be considered together, and not considered separately in parts or in sections. Each part or section must necessarily be considered in connection with every other part or section, for the law is passed as a whole and is animated by one general purpose and intent, which, in this instance was to *prohibit the traffic of certain misbranded articles and drugs in interstate commerce* (*U. S. v. 65 Casks,* 170 Fed. 449—175 Fed. 1022). When so considered, the words used in the seizure section of the Act (sec. 334) authorizing the seizure of the article "at any time thereafter", simply means at any time *while the article is still a medium of traffic in interstate commerce.* This is borne out by referring to the section of the Act defining the Acts that are prohibited (Sec. 331), among which prohibited Acts is the Act of removing the label from an article *while it is held for sale and shipment in interstate commerce.*

It will be particularly noted that there is no prohibition against the possession for personal use of a misbranded article after it had passed from the channels of interstate commerce, and the interstate character of the shipment had ended. Indeed, no such power is vested in Congress (*U. S. vs. 65 Casks,* supra). It might likewise be pointed out that neither does it prohibit the possession for home consumption of adulterated food. Yet by what reasoning can the Government claim that this Act, when read in its entirety, gives it the right to invade the privacy of a home to seize a device that is not inherently dangerous, when it makes no claim that it is empowered to enter a private home to seize from its cupboards adulterated food that had been purchased for home consumption? Moveover, the Act is significantly silent as to the purchaser or consignee of articles with respect to the use of the goods which have ceased to move in channels of interstate commerce and have acquired a situs within the State, subject only to the regulatory powers of the state.

The words "at any time thereafter" must not only have some rational and reasonable connection with the acts that are prohibited in the Food, Drug & Cosmetic Act but when considered with respect to the authority of the Government to seize and confiscate, such words must have some real or substantial relation to or connection with the powers of Congress to regulate interstate commerce, or else it would clearly be in conflict with its constitutional limitations. (*Adair vs. U. S.,* 248 U.S. 161) (*McDermott vs. Wisconsin,* 228 U.S. 115).

The Government's contention, in effect, is that under the law, as it construes it, the impress of interstate commerce when once acquired is never removed, but like Tennyson's Brook "goes on forever"; that it is therefore empowered to pursue the offending article at any time and in any place, no matter how long after the article had ceased to be a medium of interstate commerce, and no matter even if the article had found permanent lodgement in the privacy of one's home where it was being kept and used without in any manner interfering with or affecting the rights of others. In brief, that the article is *never* immune from pursuit and seizure by the Federal Authorities, wherever it may be found!

Such a contention is unreasonable and illogical and if the Government's agencies persist in adopting this construction by further invasion of private homes in their pursuit and seizure of these or like machines, as it threatens to do, it would certainly lead to results never contemplated by Congress, and certainly not by the framers of the Constitution. There surely must be some period of time when the article or device shipped in interstate commerce loses its character of an interstate shipment, and therefore ceases to be subject to the provisions of the Act. Certainly when it reaches the private home of the consignee and is intermingled with his personal property and has completely passed from the control of the shipper, and loses its distinctive character as a shipment in interstate commerce, the power of the Government to control and regulate same is at an end.

We therefore submit that to adopt the construction of the act as urged by the Government, would be repugnant to the Constitution in two ways; first, it would transcend the authority delegated to Congress to regulate interstate commerce, and, second, it would attempt to exercise police powers over matters purely local, to which the Federal authority does not extend. (*Hammer vs. Dagenhart,* 247 U.S. 351—3 A.L.R. 649).

The power delegated to Congress to regulate interstate commerce is the power to prescribe rules by which such commerce is to be governed. It certainly does not include the exercise of authority over commodities that had passed beyond the channels of interstate commerce, and had come to a permanent rest at the point of destination. (11 Am. Jur. 18) (15 C.J. (2d) 96) (*U. S. vs. 5 Boxes of Asafaetida,* 181 Fed. 561, 567) (*U. S. vs. 2 Bags,* 154 Fed. Sup. 706) (*Hypolite Egg Co. vs. U. S.,* 220 U.S. 45).

In a recent decision, this court, in the case of *U. S. vs. Phelps Dodge Mercantile Co.,* 157 Fed. (2d) 453, held that libel proceedings under the Federal Drug and Cosmetic Act could not be enforced against alleged adulterated food two years after it had ended its interstate journey, and had come to rest in the consignees' warehouse.

The case of *Schechter vs. United States,* 295 U.S. 495, 97 A.L.R. 947 is in point. We submit the pertinent parts of this opinion:

"Were these transactions 'in' interstate commerce?
* * * *

"The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers.

"Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. * * * *

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation.

"The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce had ceased.

"The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transaction in interstate commerce and was not destined for transportation to other States."

The Government has not submitted a single authority or offered any logical reason in support of its contention that it might pursue an alleged contraband article at any time and at any place after the article has ceased to be a medium of traffic in interstate commerce. Its argument in its brief contradicts this contention. "It is not the *use* of the contraband article which the appellant undertakes to manage, but the *traffic in it.*" (Appellant's Brief, Page 44). Yet at the time of the seizure, no traffic was involved or contemplated! It had

long since ended. The article had mingled with the personal property of the respondent. The Government's control thereover had long ceased and if it was at all subject to regulation, it was subject to State not Governmental control.

The object of the law which must find its authority within the commerce clause of the Constitution, is to keep misbranded articles out of the channels of interstate commerce, and certainly the law cannot be enlarged to include the exercise of police powers that exclusively belong to the state where the article had found permanent lodgment, and if the seizure of this article in this instance does not come within the commerce clause, then it would be invalid whether it involved the exercise of police powers or not. (*Nick vs. U. S.,* 122 Fed. (2d) 660).

The Government's argument that "once contraband —always contraband", as applied to this machine, so that it could not even be the subject of lawful ownership and find asylum in a private home, is as inept as is its citation of cases involving the possession of illicit liquor, narcotics, counterfeit money and the like, the possession and use of which is specifically made illegal.

No law has yet been enacted, Federal or State, that makes illegal per se the possession and use of a machine consisting merely of a cabinet, containing an electric light bulb, a container for water, glass condenser, lenses and glass slides of different colors. It is comparable to the numerous types of ultra violet ray machines, infra red ray machines and other ray disseminating devices

that are in thousands of homes, without molestation or interferences, *thus far,* by zealous partisans of medical healing. Yet notwithstanding the harmless character of this machine, the Government seeks to extend its control thereover on the theory that it once having been shipped in interstate commerce it is an "outlaw" and therefore subject at any time to seizure, even from a private home, under the powers of Congress to regulate in the interest of public welfare. In this connection, we call attention to the case of *Carter vs. Carter Coal Company,* 298 U.S. 239, which holds that Congress has no general powers to regulate for the promotion of the general welfare, and that its powers *must* be found in those granted to it to regulate commerce.

The Supreme Court has frequently said that the United States lacks the police power, for that was reserved to the States by the 10th Amendment. In other words, that the Federal Government has no general governmental authority outside the powers granted to it, and the power granted to it so far as this case is concerned, is the power to regulate interstate commerce. We repeat and reiterate that in the exercise of such restricted powers, the Government can exercise no jurisdiction over an article that has long ceased to be a medium of traffic in interstate commerce, and that any attempt so to do is outside the scope of the authority confided in Congress by the Constitution.

II.

Federal Regulation and Control Over Interstate Commerce Subject to Limitations and Guarantees of the Constitution Providing That No Person Shall Be Deprived of His Property Without Due Process of Law and That He Shall Be Secure Against Unreasonable Search and Seizure.

The power to regulate commerce does not carry with it the right to destroy or impair the limitations and guarantees which are contained in other provisions of the Constitution, and the authority to Congress over commerce cannot be made a means of exercising powers not entrusted by the Constitution. (11 Am. Jur. 15). (*McDermott vs. Wisconsin,* supra).

As previously pointed out, the Government's sole reliance for its unusual and extraordinary action in this case, is due to its strained and labored construction of the words "at any time thereafter", which it maintains confers such authority. Assuming that such construction were even permissible so as to make the offending article still an object of interstate commerce and therefore subject to regulation by Congress, it must not be overlooked that such regulation is not absolute, but is subject to the limitations and guarantees of the Constitution.

As pointed out by Mr. Justice Holmes in the case of *Federal Trade Commission vs. American Tobacco Company,* 264 U.S. 298, 2 A.L.R. 786:

> "We cannot attribute to Congress an intent to defy the 4th Amendment or even to come so near doing so as to raise a serious question of the constitutional law. * * * Anyone who respects the spirit as well as the letter of the 4th Amendment would be loathe to believe the Congress intended to authorize one of its subordinate agencies to sweep our traditions into the fire."

The forcible seizure of this machine from the private home under the circumstances in this case, was most arbitrary and tyranical and more in keeping with the practice of Nazi Rule, and not of a free democracy, which guarantees the sanctity and security of the home. Verily, freedom flies out of the window when force comes in at the door!

Historical arbitrary seizure has been one of the great grievances against despotic power. In these days the reason for the protection of persons and property and the fact that they are protected are almost forgotten in the paucity of the attack upon them. Yet how the protection was wrung from reluctant tyrants must always be borne in mind and no action can be sanctioned which would tend to weaken the great safeguard of our liberties and permit encroachment thereon which might be justified by authority of law or by judicial interpretation. (*U. S. v. 8 Packages,* 5 Fed. (2d) 971) (47 Am. Jur. 507).

Our courts have thus far jealously enforced the principles of a free society secured by the prohibition of unreasonable search and seizure. Its safeguards are not to be worn or whittled away by a process of devitalizing interpretation.

If the house of a man is to be regarded and respected as a refuge for himself, a place of safety for his property and of repose for his family, in brief, a sanctuary,— upon what reasonable basis can the Government justify its conduct, particularly where the Marshal was armed with a civil and not a criminal process.

The general rule is that an officer cannot force his way into a dwelling house to execute civil process, whether he be armed with a writ of attachment (4 Am. Jur. 893), or with a writ of execution (21 Am. Jur. 70). This is so because the law ever jealous of intrusion on domestic peace and security, regards every man's home as his castle. (*Legman vs. U. S.,* 295 Fed. 474, C.C.A. 3rd Cir.). Certainly the writ of libel carried no greater authority.

As stated by the court in the case of *Weeks vs. U. S.,* 232 U.S. 383:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law."

The Supreme Court of the United States in a series of decisions, which have been consistent in their tenor, has clearly indicated that it does not and will not sanction lawless and unconstitutional conduct of governmental agencies in their disregard of the protection given to all alike by the Constitution of the United States, against unreasonable search and seizure of one's prop-

erty (*Gouled vs. U. S.,* 255 U.S. 298; *Amos vs. U. S.,* 255 U.S. 313; *Agnello vs. U. S.,* 269 U.S. 20; *U. S. vs. Lefkowitz,* 285 U.S. 452; *Go-Bart vs. U. S.,* 285 U.S. 334; *Boyd vs. U. S.,* 116 U.S. 616).

These cases all recognize, not only the binding force of the Constitutional prohibition against unreasonable search but its high necessity to protect the sanctity of the home and privacies of life, and that its protection is so broad and ample that it embraces all persons and that the duty of giving it full effect rests upon all entrusted under our Federal system with the enforcement of the laws.

Moreover it will be noted that the libel proceeding filed by the Government was not verified by any person having knowledge of the facts, and failure of such verification, nullifies the warrant issued thereunder (*U. S. vs. 8 Packages,* 5 Fed. (2d) 971). While this decision is challenged by the opinion in the case of *U. S. vs. 935 Cases,* 136 Fed. (2d) 523, the opinion therein specifically pointed out "that there is no element of search or invasion of the privacy of a citizen or of his home involved in the case at bar".

Among the inalienable rights declared by our Constitution as belonging to each citizen is the right of acquiring and possessing property. For the Constitution to declare a right inalienable and at the same time leave to Congress unlimited power over it, would be to destroy, not to conserve, the rights it vainly assumes to protect, thereby reducing the constitutional amendments to a form of words.

While it may be conceded that Congress has power to make regulations in aid of prohibiting interstate shipments of misbranded articles and adulterated food, such regulations, if at all enforcible, after the interstate shipment had ended, must be germane to the purpose sought to be accomplished, that is, the prevention of the exploitation of such articles for the purpose of resale or retransportation. In other words, there must be a direct relationship to the objects sought by the Act. There is no rational basis whatsoever for an arbitrary fiat that the use of this machine is dangerous to public health, and to attempt to condemn and confiscate same when not intended for sale or transportation simply because it had at one time been introduced in interstate commerce, does violence to the due process clause of the Constitution. In brief, Congress has no power under the guise of regulating commerce to interfere with personal rights, thereby infringing upon and defying constitutional guarantees. (11 Am. Jur. 992, 994) (12 Am. Jur. 344) (*Nick vs. U. S.,* supra) (*Carter vs. Carter Coal Co.,* supra).

As expressed in the opinion in the case of *Wright vs. Hart,* 182 N.Y. 330, 74 N.E. 404:

> "Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarcation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the Constitution has been trespassed upon, and, when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised."

Both these Amendments (4th and 5th) contemplated perpetuating in their full efficacy by means of constitutional provisions, the principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity free from the possibilities of future legislative change (*Boyd vs. U. S.,* 116 U.S. 616).

We therefore submit that even if the Food, Drug and Cosmetic Act were so interpreted and construed as to authorize proceedings against this machine on the theory that it was still a subject of interstate commerce, it cannot be permitted to do violence to the constitutional guarantees for the security of property and protection of the home against invasion.

III.

The Claimant Had the Inalienable Right to Prescribe for Himself in Any Manner He Saw Fit Without Governmental Interference.

It was Herbert Spencer who said:

> "Every man has the right to do whatever he wills, provided that in the doing thereof he infringes not the equal rights of any other man."

The Constitution was expressly intended to guarantee that right. The term "liberty" as prescribed by the Constitution is not to be cramped into meaning mere freedom from physical restraint but is deemed to express the right to the use and exercise of one's powers, one's

faculties and one's property in any manner he may see fit, and to enjoy those things in such a way as his inclination might suggest, if it be not evil in itself and in no way invades the rights of others.

The claimant's use of the machine in any way he may see fit, without coercion by the Government is his own prerogative, just as it is the right and prerogative of a Christian Scientist to attempt to effect a cure of his bodily ailments without medical interference.

The late Mr. Justice Brandeis, in championing the "right to be let alone" said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment." (From dissenting opinion in the case of *Olmstead v. U. S.*, 277 U.S. 438, 478—66 A.L.R. 391).

The question here involved is not the merits of the spectro-chrome, or whether it is preferable to submit oneself to treatment by doctors practicing medicine and surgery, or by practitioners of Christian Science, or by the rays of a machine. The issue here is the sacred and fundamental right of an individual to follow whatever

practitioner or method of treating himself he pleases.

There are those who believe in the application of physio therapy as the only medium of treatment, such as therapy by x-ray, violet ray or infra red ray machines, and there are those who believe that the radiation of the colors disseminated by the spectro-chrome is more preferable. And, there are those who believe that conformity to the laws of nature or religious faith are to be preferred to medical and surgical treatment.

In olden days the magical words of the tribal medicine man, or the barbaric priest, were considered the most efficient methods of obtaining curative results. There are still in existence many people who believe in the curative effect of certain vegetables, fruits or herbs. The prayers of certain religious practitioners backed by the knowledge that God's plan provides a great healing power in ourselves, are considered far more efficient by some than the ministration of doctors.

The right of belief in any particular religion without molestation on account thereof is guaranteed to every one by the first amendment to the United States Constitution, which specifically enjoins Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. Would it be contended that the followers of Mary Baker Eddy in the method of treating their ailments by religious faith could be forced to accept the treatment of medical practitioners?

It might be refreshing to recall the words of Thomas Jefferson, who wrote as follows:

> "The state has no jurisdiction over the conscience of the subject, nor the right to intervene between that conscience and his God. The care of every man's soul belongs to himself, but what if he neglected the care of it; what if he neglected the care of his health or estate, which more nearly relates to the state, *Will the magistrate make a law that he shall not be poor or sick?* The laws provide against injury from others, but not from ourselves. God himself will not save men against their wills." (Young Jefferson by Claude Bower).

The Government in one breath asserts "that it has no design to interfere with the right of an individual to select his own manner and means of treatment, (Appellant's brief, page 44), and yet it claims that under the police power of the Food, Drug and Cosmetic Act it had the right at any time and place to seize and condemn articles of contraband that had at some time been introduced in interstate commerce, because they are dangerous to health, and it even goes so far as to hold out the frightening suggestion that it would be suicidal for a person to follow the directions of the labelling that accompanied the machine.

The real and impelling cause for the extraordinary zeal of the Government in this instance, is found in this statement, "it seems clear therefore that the machine is recommended in its labelling as effective as a remedy or cure for a number of diseases which are universally recognized to be fatal unless subjected to proper *medical* or surgical treatment." (Apellant's brief, page 13).

It must be evident that the action of the Government is a misdirected, though well-meaning effort, spurred on by the Federal Security Agency under the

prodding of the American Medical Association to prevent the use of this type of machine or device for the treatment of human ailments and to coerce the users to secure medical treatment. In this connection it might be interesting to speculate whether the same zeal would be displayed were the machine an infra red lamp, or other of the numerous type of devices advocated by practitioners of physio therapy, and by many medical practitioners as well. Undoubtedly many claims therefor have been made that could likewise be proven false and misleading by the medical profession, but which nevertheless have produced the desired results.

As stated by Judge McColloch in his memorandum opinion filed in this case:

> "I know many people who wear charms, including some who carry the lowly potato to keep disease away, and I had always thought they had the right to do this. Incidentally I have no doubt that many get help in this manner." (Tr. p. 24)

Indeed, in the article appearing in the Time Magazine, May 20, 1946, Dr. Herman Vommer of New York, expressed his opinion supported by findings of French, German and Swiss dermatologists that "suggestion is at least twice as an effective cure for warts as X-rays or surgery", and proved it by charming away a face full of warts from the daughter of a skeptical dermatologist!

It was not so long ago that the medical profession charged, and many orthodox doctors still charge, that chiropractors and osteopaths were and are quacks and close their minds to the technics that these practitioners have developed, claiming that they were dangerous and

a menace to health, notwithstanding that thousands have been benefited by their treatment.

These tactics have been used against every non-medical person who has helped to advance the healing arts. Elizabeth Kenny, the nurse whose methods have revolutionized the treatment of polio, was the most recent target. The best answer was supplied by Oliver Wendell Holmes, who reminded the arrogant doctors that medicine learned "from a Jesuit how to cure agues, from a friar how to cut for the stone, from a soldier how to treat gout, from a sailor how to keep off scurvy, from a postmaster how to sound the Eustachian tube, from a dairymaid how to prevent small pox and from an old market woman how to catch the itch-insect." (Readers Digest, February, 1947, p. 106).

CONCLUSION

To summarize the salient point in the case.

The machine or device had long since ceased to be a subject of interstate shipment. It had found permanent lodgment in the home of the claimant. It was his own private property—bought and paid for. The machine was not inherently dangerous. In its construction it was not unlike thousands of other machines equipped with glass slides of different colors, radiating multi-colored lights. It was clearly not injurious per se. It certainly could not, of its own physical operation, produce any direct physical injury to anyone. It was, according to the Government's own contention a useless piece of metal.

Regardless of the fraudulent representations, if any, that accompanied the machine as to its efficacy as a treatment and cure for certain diseases, the claimant believed and had faith that it could benefit his ailments. Whether the machine could be given credit therefor, or whether it was due to faith, or the power of suggestion, or to nature's own reservoir of healing powers in one's body, the fact remains that he was benefited by its use.

Upon no justifiable theory can the Government claim the right to invade his private home and take his private property away from him when that private property is not in and of itself directly injurious to him or to anyone else, but the Government contends that it is indirectly injurious in that serious injury, prolonged illness or death might follow, if medical treatment were delayed due to the use of the machine. Such a contention invites the comment frequently expressed of "doctors' mistakes" and "errors in judgment", which too often are buried with the patient!

We resist the temptation to further explore the subject, but simply point out that medicine is not an exact science and that its practice is likewise not immune from the dangerous consequences that follow its failure to effect a cure of human ailments.

But if the Government is justified in its pursuit of this machine on the ground that it indirectly might cause injury to its users because of delay in securing appropriate medical treatment, then we submit that the Government could, with equal reason, claim the right to invade the home to seize, burn and destroy many

books, documents and papers that are daily the medium of traffic in interstate commerce, and which contain within their covers many false and misleading statements and theories, which undoubtedly produce indirect injuries to those individuals who believe and consequently conduct their lives in accord with those false misleading statements and theories.

We recall the many articles of Dr. Fletcher, who advocated the fad of chewing food to impalpability, which indirectly caused indigestion; the articles advocating fresh air schools which indirectly caused pneumonia; the articles advocating the cutting out of tonsils, adenoids and other vital organs; the articles advocating the use of certain vitamins, pills, nostrums and other home remedies and treatments which indirectly caused many injurious consequences to one's health and life. These examples can be multiplied by the score.

To present these illustrations is to refute the Government's contention, and to support the opinion of Judge McColloch that the injury must be direct and not indirect, and that in the face of this continued interference with and encroachment upon our Constitutional guarantees it is "time for the Federal Judges to dust off the Constitution."

Respectfully submitted,

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